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Issue Date: 19 December 2006

CASE NOs. 2004-LHC-0885, 0886, 0887

OWCP NOs. 18-75329, 78882, 79281

In the Matter of:

M.I.,
Claimant,

vs.

EAGLE MARINE SERVICES,
Self-insured Employer.

Appearances:

Charles D. Naylor, Esq.
For the Claimant

Daniel F. Valenzuela, Esq.
For the Employer and Carrier

BEFORE: ALEXANDER KARST
Administrative Law Judge

ORDER GRANTING REQUEST FOR MODIFICATION

This case involves three consolidated claims for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("the Act"). A Decision and Order was issued on April 27, 2005. Presently before me is Claimant's Request for Modification of the Decision and Order dated April 27, 2005. A hearing on the issues raised by Claimant's request was held on July 10, 2006 in San Francisco, California.

Claimant sustained an admitted injury to the right scapula on February 20, 2001. In my Decision and Order of April 27, 2005, I concluded that Claimant also sustained cumulative trauma injuries to his neck and back which were compensable under the Act. *See* Decision and Order, April 27, 2005 ("D&O"), at 11. Benefits were denied for a third claim of left shoulder injury, as it was not shown to be work-related. D&O at 12. Based on the injuries to his neck and back, Employer was ordered to pay Claimant compensation for temporary total disability from September 27, 2002 through December 2, 2003, for temporary partial disability from December 3, 2003 through May 30, 2004, and for permanent partial disability from May 31, 2004 and continuing into the future.

Claimant, who was unable due to his injuries to return to his former occupation as a steady sweeper, began his post-injury job as a marine clerk on June 21, 2004. When this matter came on for trial on July 20, 2004, earnings records for an eighteen-day period were used to project Claimant's residual wage-earning capacity. His total earnings for this period, $5,560.68, were divided by eighteen days of available work then multiplied by seven days, for a post-injury wage-earning capacity of $2,162.48 per week. *See* D&O at 17-18. That sum subtracted from the stipulated pre-injury average weekly wage of $2,705.00 yielded a wage loss of $542.52 per week, and a corresponding compensation rate of $361.68 per week. On June 1, 2005, I granted (in part) Claimant's request for reconsideration and adjusted his post-injury wage-earning capacity downward for inflation—from $2,162.48 to $1,995.10—by reference to annual increases in the National Average Weekly Wage ("NAWW").[1] *See Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990). Claimant's compensation rate was thereby increased to $473.26 per week.

Claimant seeks modification of his compensation award with respect to his post-injury earning capacity. He submits that earnings records from his post-injury job, which are currently available from June 21, 2004 through May 19, 2006, show a greater loss in earning capacity than was initially projected in the Decision and Order. Once the new wage-earning capacity is ascertained, Claimant requests that the figure be adjusted downward to account for inflation by reference to the NAWW and that the modification be made effective retroactive to the date of injury. In addition, Claimant seeks an order requiring Employer to reimburse him for certain medical expenses and unpaid "medical mileage."

Employer argues that modification is not warranted in this case. If modification is found to be appropriate, however, Employer contends that Claimant's economic position has not deteriorated to the extent requiring an increase in compensation. Employer asserts that Claimant's retained wage-earning capacity should be adjusted for inflationary factors based on increases in the general wages of longshoremen as set forth in the collective bargaining agreement which applies to Claimant. It further contends that any modification of the compensation order should be effective no earlier than August 26, 2005, the date on which Claimant filed his request for modification. Finally, Employer denies liability for the claimed outstanding medical expenses.

The Standard for Modification

Section 22 of the Act provides all parties with a mechanism by which they can modify an existing compensation award or previous denial of such an award. The section provides in pertinent part:

> Upon his own initiative, or upon the application of any party in interest . . . on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy

[1] The Order on Motion for Reconsideration dated June 1, 2005 also denied Claimant's request to introduce wage evidence which was not in existence at the time of trial. *See Contempo Metal Furniture Co. v. East Texas Motor Freight Lines, Inc*., 661 F.2d 761, 766 (9th Cir. 1981). Thereafter, Employer moved for reconsideration of the June 1st Order, arguing that Claimant's earning capacity should be adjusted based on yearly increases in his collective bargaining agreement. Employer's motion was denied on June 22, 2005.

> commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation . . . review a compensation case . . . [and] issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

See 33 U.S.C. § 922.

The party requesting modification has the burden of proof to show a mistake of fact or change in condition. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). An initial determination must be made whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or a change in circumstances and/or conditions. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993). The standard for obtaining a modification for mistake of fact is the same as that for all modification proceedings: it must render justice under the Act. The fact-finder has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keefe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 254, (1971), *reh'g denied*, 404 U.S. 1053 (1972). Facts relating to the nature and extent of a claimant's disability have been deemed a proper subject of modification proceedings. *See, e.g., Allen v. Strachan Shipping Co*., 11 BRBS 864 (1980); *Steele v. Associated Banning Co.*, 7 BRBS 501 (1978). As section 22 notes, a party may also support an application for modification by showing a "change in conditions." Such a change may either in the claimant's physical condition or in his economic conditions. The United States Supreme Court has held that a "disability award may be modified under Section 22 where there is a change in the employee's wage earning capacity, even without any change in the employee's physical condition." *Metropolitan Stevedore Co. v. Rambo*, 115 S. Ct. 2144, 30 BRBS 1 (1995).

Claimant argues that the wage evidence he has submitted in this modification proceeding demonstrates a mistake of fact in that the method utilized in the Decision and Order failed to accurately project his retained wage-earning capacity. Alternatively, Claimant submits that modification is supported by a change in his physical condition or economic circumstances.

Before Claimant began his post-injury job as a marine clerk, his treating physician, Dr. Spencer, imposed physical restrictions with regard to his back conditions.[2] CX 17 at 8.[3] Dr. Spencer recommended that Claimant be able to stand at will and restricted him from driving a truck, performing overhead work, and lifting more than twenty pounds. CX 17 at 8; CTX 28 at 983; CTX 31 at 64. When questioned further, Dr. Spencer testified that Claimant could spend five to six hours of an eight-hour shift sitting and working at a computer, and could remain seated for about one hour at a time. CTX 31 at 64-65. As for Claimant's neck condition, Dr. Spencer restricted him against repetitive overhead work or twisting of the neck. CX 17 at 9. Given these restrictions, I found in my April 27, 2005 Decision and Order that, of the various

[2] Dr. Spencer is an orthopedic surgeon who has been in private practice for 24 years, and his sub-specialty is spinal injuries. CTX 31 at 6-7. He estimates that spinal surgery is about 70 percent of his practice, and he performs 400 to 500 spinal surgeries per year. *Id*. at 7.

[3] Evidentiary exhibits submitted in the course this modification proceeding are denoted as "CX" (Claimant's Exhibits) and "EX" (Employer's Exhibits). Claimant's and Employer's original trial exhibits, submitted at the hearing on July 20, 2004, are abbreviated "CTX" and "ETX", respectively.

marine clerk positions available to him, the only position which Claimant is not physically capable of performing is the yard clerk position. D&O at 15. I found that he is capable of working at a computer up to six hours a day if given the ability to stand intermittently, working as a marine clerk up to five days a week, and performing jobs which require him to occasionally look overhead or side-to-side. *Id*. I specifically found incredible Claimant's testimony that he is unable to look up or side-to-side in light of a sub rosa surveillance video submitted by Employer, which showed him doing these activities with no apparent difficulty. *Id*.

In the current proceeding, Claimant testified that upon returning to work as a marine clerk on June 21, 2004, he worked various positions. He initially worked as a gate clerk, but testified that the gate clerk jobs have now "been moved inside" and require sitting at a desk, which Claimant says he has trouble doing. Tr. at 49-50, 58. Claimant has also tried yard clerk, inventory clerk, floor runner, and DST clerk (double stack train), which are truck-based jobs. Tr. at 52-53. He testified that it is difficult for him "to sit in a truck and contort [his] body in order to input data into that computer," which is located on the passenger side of the vehicle. Tr. at 54. He also indicated that driving through the terminal is "hard" on his back and neck because there are pot holes and railroad tracks, and the employer-owned trucks are often not in good condition. Claimant testified that sitting for too long, driving over rough roads and twisting or turning aggravate his back and neck. Tr. at 34.

Claimant claims to have particular difficulty with those marine clerk positions—most notably the tower clerk position—which require him to sit for prolonged periods. He explained that it "[h]urts my neck to sit at a desk and do computer work, input work. I don't have trouble doing work if I can stand. I prefer to stand and be able to walk. But if I can't walk while I'm doing my work, if I can stand, that makes it better for me." Tr. at 59. Claimant testified that he attempted to modify his tower clerk workstation at Eagle Marine Services by putting telephone books and reams of paper underneath the computer monitor and keyboard in order to enable him to work at the computer in a standing position. Tr. at 59. However, Captain Tom Lombard, an expert in workplace safety who has been retained as Employer's vocational expert, discouraged Claimant from attempting to make such modifications.[4] Tr. at 60.

Claimant has continued to receive treatment for his neck and back from Dr. Spencer since returning to work on June 21, 2004. On August 9, 2004, Dr. Spencer recorded Claimant's complaints that he "can't drive in a truck for any period of time," and has moderate pain with repetitive twisting and intermittent right leg pain. CX 4 at 89. On October 18, 2004, Dr. Spencer noted that Claimant's low back seems to bother him most of the time. The doctor wrote: "[Claimant] does better when he has a job where he moves around. If he sits more than 10 to 15 minutes, his legs go numb." *Id*. at 88. On December 16, 2004, Dr. Spencer reported that Claimant "needs to work in an upright position with only occasional sitting." *Id.* at 87. On June 2, 2005, Dr. Spencer noted Claimant's complaints that he is having difficulty sitting, bending and standing for prolonged periods, as well as numbness in the big toe. *Id*. at 86. On July 14, 2005,

[4] In his deposition of September 18, 2006, Capt. Lombard testified that he recalls seeing Claimant attempt to create a raised workstation for himself using telephone books and the like to raise the equipment on the desk. EX 14 at 47. He believed this was an attempt by Claimant to accommodate his back problems. *Id.* at 47-48. He said that he remembered seeing Claimant "hunched over" and he cautioned Claimant that such adjustment would risk other injuries. EX 14 at 47.

Claimant reported to Dr. Spencer that he had been bending over "when something popped in his back," resulting in pain that radiates across the left iliac crest down into the groin. CX 4 at 85. Dr. Spencer put Claimant on an eight-day course of steroids and started him on Neurontin. CX 17 at 22. On July 27, Dr. Spencer reported that Claimant is "much better" since taking the steroids. On March 29, 2006, Dr. Spencer reported that Claimant is "stable," and taking Neurontin and three Vicoprofen per day. The doctor prescribed sleep medication for the nights when "his neck is quite symptomatic." CX 4 at 81.

In his deposition on June 29, 2006, Dr. Spencer testified that Claimant has degenerative spondylolisthesis which has undergone a fusion and adjacent level degeneration which will progress over time. CX 17 at 9. Claimant also has "very severe" spondylostenosis in the cervical spine and degeneration at multiple levels. Dr. Spencer testified that the work restrictions he imposed in May 2004 remain unchanged, except that he does not want Claimant sitting as much as he previously had allowed because his symptoms have changed. CX 17 at 30. He said that while he had previously opined that Claimant may sit for up to five hours per day, the doctor now feels Claimant should sit for no more than three hours a day, standing and walking around during the balance of the shift. *Id.* at 31. Dr. Spencer explained that there has been no objectively measurable deterioration or change in Claimant's degenerative condition except for the increase in symptoms he reportedly experiences when he sits for too long. *Id.* Dr. Spencer further explained that the previous physical restrictions were imposed before Claimant returned to work, but now that he is working "we're seeing symptoms that are a little bit different." CX 17 at 32. According to Dr. Spencer, Claimant reported that sitting was bothering him more than it used to, but he was "doing reasonably good at standing" [*sic*]. *Id.* at 19. Dr. Spencer therefore recommends that Claimant work primarily in a standing position with opportunities to sit when needed to rest. CX 17 at 19. Dr. Spencer testified that he takes into account what Claimant tells him about how he is feeling and considers whether Claimant's subjective symptom reports are credible in determining appropriate medical treatment and/or work restrictions. *Id.* at 40.

In addition to the limitation on sitting, Dr. Spencer opined that repetitive twisting, overhead activity, and the vibration caused by operating motor vehicles for prolonged periods of time will accelerate the degenerative process in Claimant's spine. CX 17 at 10. The doctor testified that "I don't want [Claimant] driving all day. Especially, you know, in rough vehicles that go over uneven terrain." *Id*. at 12. Dr. Spencer opined that Claimant can drive a truck as part of his clerking job so long as the vehicle has shock absorption. He also felt it would be appropriate for Claimant to drive his own personal SUV. CX 17 at 35. Additionally, Dr. Spencer opined that Claimant should avoid overhead activity. CX 4 at 87. He testified that Claimant has arthritis in the posterior joints in his neck, which become inflamed when he looks up or turns his head repetitively. CX 17 at 17. The doctor further testified that inflammation of the joint causes enhanced arthritis, which is why it is important for Claimant to follow the restrictions and avoid irritation and pain. *Id*. at 18. Dr. Spencer opined that one should restrict oneself from activity which, when done repetitively, causes pain. *Id.* at 45. He felt that the extent to which an activity causes increased pain is a reasonable measure of the frequency of that activity which should be avoided. *Id.* He testified that the magnitude of pain is the most important factor in determining whether Claimant should continue to engage in a particular activity, and said that he should avoid activities that exceed a "low level of pain." CX 17 at 46.

Dr. Spencer opined that Claimant requires continuing care for his neck and back problems, and that these conditions will continue to deteriorate over time. CX 17 at 28-29. He explained that the work restrictions he has imposed are intended in part to enable Claimant to continue working while managing his pain level and minimizing the "wear and tear" on his spine, in order to delay the need for additional spinal surgeries. *Id.* at 29. Dr. Spencer opined that it is reasonable for Claimant to work up to five days in a row. However, he does not want Claimant to work six or seven straight days. According to the doctor, "[h]e needed some time to effervesce at the end of the week and not work seven days a week," which would put too much strain on his neck and back. CX 17 at 49. Dr. Spencer felt that if performed within the above restrictions, a marine clerk positions remains appropriate for Claimant. *Id.* at 41.

Claimant also continues to receive treatment for his right scapula from Dr. Morrison, with whom Dr. Spencer shares offices.[5] In his deposition of June 13, 2006, Dr. Morrison testified that Claimant had sustained a right scapular body fracture with about five millimeters of displacement, which injured the subscapularis and rhomboid muscles. CX 16 at 8-9, 31. He further testified that since that injury, Claimant has had "flare-ups of subscapular and rhomboid tendonitis," with painful symptoms which occur every three to six months. *Id*. at 9. The doctor treats these symptoms with a cortisone injection administered every three to six months. *Id*. He considers Claimant's right shoulder condition to be permanent, although he expects the symptoms of the condition will continue to "wax and wane." CX 16 at 10. Dr. Morrison restricts Claimant against repetitive pushing or pulling more than 25 pounds, repetitive use of the right arm above shoulder level except occasionally and involving less than five pounds, and using pneumatic tools with the right upper extremity. *Id*. at 20. Dr. Morrison also restricts Claimant against driving vehicles with no power steering due to his right scapula condition. *Id.* at 23.

Dr. London examined Claimant on behalf of Employer on April 12, 2006 in connection with this proceeding and issued a report dated April 18, 2006.[6] EX 1. Dr. London opined with regard to the right scapula that Claimant had sustained a non-displaced fracture. EX 12 at 14. He read an MRI taken on March 26, 2002 as showing that the muscles surrounding Claimant's scapula were normal and not inflamed, and therefore disagreed with Dr. Morrison's diagnosis of tendinitis in the subscapular and rhomboid muscles. *Id.* at 17. He opined that Claimant has no residuals from the February 20, 2001 right scapula injury, requires no further treatment, and has no work restrictions attributable to that condition. EX 1 at 32; EX 12 at 18, 22.

With regard to the back, Dr. London concluded that Claimant has degenerative conditions in both the lumbar and cervical spinal regions. He noted that Claimant had a decompressive lumbar laminectomy at three levels and a fusion at the L2-3 level. EX 12 at 18. With regard to the lumbar spine, Dr. London testified that Claimant should not engage in any heavy lifting or carrying over 20 or 25 pounds, repetitive bending or stooping, or prolonged work in awkward positions. *Id*. at 19. Dr. London would not restrict Claimant's sitting or standing, although he noted that "there may be times where he would want to change his position, but most of the jobs

[5] Dr. Morrison has been a board-certified orthopedic surgeon for over eighteen years, and his sub-specialty is shoulders and elbows. CTX 30 at 5-6.

[6] Dr. London is a board-certified orthopedic surgeon who has practiced in California for thirty years. EX 12 at 5-6. Dr. London also examined Claimant at Employer's behest in connection with the earlier trial in this matter.

on the waterfront will allow that." *Id*. at 20-21. Dr. London also concluded that Claimant has degenerative cervical disk disease and, due to this condition, would restrict him against prolonged neck extension or overhead work. *Id*. at 19. Dr. London opined that Claimant is not restricted or precluded from performing tower clerk or data entry work. EX 12 at 21.

I note that since the issuance of the Decision and Order in April 2005, the only significant change in the physical restrictions recommended by the various physicians is Dr. Spencer's imposition of a restriction of the length of time for which Claimant may sit during a work shift. I also note that Dr. Spencer's opinion that Claimant should stand as a primary working position and should not sit for more than three hours a shift is not supported by the opinion of Employer's expert, Dr. London. On balance, however, I find the opinions of Dr. Spencer to be more persuasive than those of Dr. London. Although Dr. London testified that he would not restrict Claimant's sitting, he admitted that there were a number of reports generated by Drs. Spencer and Morrison which were not mentioned in his report of April 18, 2006, and which he did not review at any time prior to his deposition on July 18, 2006. *See* EX 12 at 28-37. Consequently, Dr. London, in formulating his opinions about Claimant's work restrictions, was not aware of Claimant's persistent complaints that sitting was causing him discomfort, nor was he aware of Dr. Spencer's recommendation that Claimant should not sit for more than three hours a shift. Dr. London also was not aware that Claimant formally requested an accommodation in the form of raised work stations in the tower clerk areas of all terminals in the Los Angeles and Long Beach ports. EX 12 at 37. Given these gaps in the information reviewed by Dr. London, I am not persuaded that I should substitute his opinions regarding Claimant's physical limitations, particularly the extent of Claimant's ability to sit for prolonged periods, for the considered recommendations of the Claimant's treating physician who has been following him throughout the treatment for his injuries.

In the Ninth Circuit, where these claims arose, a claimant's treating physician's opinion is entitled to "special weight" in considering medical evidence. *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). Dr. Spencer explained that he imposed the sitting restriction in light of the symptoms Claimant experienced over the time he has worked as a marine clerk, an approach which strikes me as entirely reasonable. Dr. Spencer also testified that he considers the credibility of Claimant's subjective complaints in arriving at appropriate physical restrictions. Since Dr. Spencer has opined, admittedly without any objective basis for doing so, that Claimant should not sit for more than three hours a shift, I presume that Dr. Spencer has found Claimant's complaints about sitting to be credible. Dr. Spencer's opinion with regard to the sitting restriction is well-reasoned and lucidly explained, and although not based on objective evidence of deterioration in Claimant's condition, the basis for the sitting restriction is firmly rooted in Claimant's consistent and well-documented complaints as reflected in Dr. Spencer's records. Accordingly, I credit Dr. Spencer's conclusion that Claimant needs to work primarily in a standing position with opportunities to sit when needed to rest, and should sit for no longer than three hours per work shift. CX 17 at 19.

In addition, I credit Claimant's testimony about the discomfort he experiences from prolonged sitting and the alleviation of that discomfort when he is able to stand and/or walk. As previously noted, these types of complaints are well-documented in the medical records generated by Dr. Spencer since Claimant returned to work. Claimant also credibly testified that

he enjoys editing his photographs at home, for which he utilizes a standing work station, and that he pays his bills, reads the newspaper, and works on his computer all while standing up. Tr. at 114. I note that Claimant has taken steps to explore the various employment opportunities available to him as a marine clerk, and through his testimony has provided a detailed account of the types of activities he has found himself physically capable of doing on a consistent basis. I have no reason to question Claimant's willingness to work, and I note that he has been proactive in seeking out jobs which allow him to work within his perceived physical abilities. In my view, these factors support the veracity of Claimant's subjective complaints about sitting and the appropriateness of a sitting restriction.

Claimant's subjective complaints about sitting are also supported by his initiation of the formal process for requesting a workplace accommodation for this problem. On December 28, 2004, Claimant submitted a written request to the Joint Port Labor Relations Committee ("Port Committee") suggesting that each terminal modify two workstations in their tower gate areas in order to allow employees to stand while working. CX 8. Claimant also pointed out that his physical limitations preclude him from performing the full range of jobs which would qualify him for a promotion from "basic clerk" to the better-paying "key clerk" positions, and therefore suggested that the guidelines for promotion be adjusted in order to allow him and others with similar disabilities to qualify for the additional job opportunities. *Id*.

On January 5, 2005, the Port Committee referred Claimant's request to Dr. Philip Harber, who examined Claimant and issued a report dated February 14, 2005. In his report, Dr. Harber wrote: "Although the mechanism of his requirement for standing up is not certain, [Claimant] is adamant that he cannot sit for a very long period; therefore, since this patient does have extensive objective abnormalities related to the surgeries, I believe it is medically reasonable to recommend accommodation in view of his subjective reports." CX 10 at 118. Dr. Harber opined that Claimant "might be able to do tower clerk work if he could stand when he does this. This may require some limited modification of the work station, such as raising the monitor and keyboard . . . ." *Id.* Following review of Dr. Harber's report, the Port Committee referred Claimant's accommodations request to the Joint Coast Labor Relations Committee ("Coast Committee") on April 15, 2005, with the recommendation that all area terminals modify two tower clerk work stations to allow a marine clerk to work in a standing position. CX 10 at 111. On May 12, 2005, the Coast Committee granted Claimant an accommodation allowing him to qualify for a key clerk promotion based solely on fulfilling the requirements for a tower clerk. *Id.* at 109. However, the Coast Committee held over for further review the recommendation of the Port Committee that the terminals install standing stations in the tower areas. *Id.* at 110.

Thus, although Claimant's pursuit of an accommodation has not been fully successful, I find that his efforts and the report and opinions of Dr. Harber further support the need for the sitting limitation recommended by Dr. Spencer.

Employer submitted a sub rosa surveillance tape on which were recorded Claimant's activities on July 22 and 24, 2005.[7] EX 11. While there is little of substance from July 22, the tape of July 24 shows Claimant engaged in various activities. Most notably, it shows him and his wife spending the afternoon at a beach near their home. Having reviewed the tape, I find that this evidence is not inconsistent with Claimant's asserted inability to sit for extended periods as it portrays him standing up or walking around during the majority of time at the beach. Although Claimant is also shown doing some bending, he is not asserting an inability to walk, stand or bend, but rather has testified that he is more comfortable standing or walking than when sitting. Accordingly, the sub rosa video does not alter my conclusion about Claimant's sitting restriction.

I find that Claimant has presented sufficient evidence to establish that he has a physical restriction requiring that he work primarily in a standing position with the opportunity to sit when needed, and precluding him from sitting for longer than three hours a work shift. I further find that this represents a more significant restriction than that which was in effect at the time of my initial Decision and Order. As a result of that new limitation, marine clerk jobs which were previously found to be suitable for Claimant may no longer be so. Accordingly, I find that Claimant has met the requirements for a modification by establishing a change in his physical and/or economic condition, and his request for modification is therefore granted.[8] The question that remains is whether and how this change has affected his post-injury wage-earning capacity.

Retained Wage-Earning Capacity

Section 8(h) of the Act provides that a claimant's wage-earning capacity shall be his actual post-injury earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). The ultimate objective of the wage-earning capacity formula is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (9th Cir. 1985). Consideration is given to such factors as a claimant's physical condition, age, education, industrial history, earning power on the open market, and availability of employment which he can perform after the injury. *Abbott v. Louisiana Ins. Guaranty Ass'n.*, 27 BRBS 192 (1993), aff'd, 40 F.3d 122 (5th Cir. 1994). Regarding physical condition, consideration is given to whether the employee must seek light work, or turns down heavy work and requires time off. *Conde v. Interocean Stevedoring, Inc*., 11 BRBS 850, 857 (1980). Also considered is whether the employee loses work for physicians' visits necessitated by the injury. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 590 F.2d 330, 9 BRBS 453 (4th Cir. 1978). The party contending that a claimant's actual wages are not representative of his wage-earning

[7] At the modification hearing, Claimant raised an issue with regard to whether the videotape had been edited or altered in some way. Claimant's counsel indicated an intention to take the deposition of the videographer and to bring any concerns regarding the tape's authenticity to my attention. *See* Tr. at 23. No deposition has been forthcoming and I have not heard anything more about this issue, however. I therefore presume that Claimant is not challenging the authenticity of the sub rosa videotape and accordingly, it is admitted into evidence as EX 11.

[8] I note that Claimant sought modification based on a mistake of fact, and in the alternative, a change in physical or economic condition. However, an Administrative Law Judge is not precluded from modifying a previous order on the basis of a mistake in fact although the modification was sought for a change in condition. *Thompson v. Quinton Engineers, Inc*., 6 BRBS 62 (1977). *See also O'Keefe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 92 S. Ct. 405 (1972), reh'g denied, 404 U.S. 1053, 92 S. Ct. 702 (1972. I see no reason why the inverse should not hold true.

capacity has the burden of establishing an alternative reasonable wage-earning capacity. *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983).

Employer contends that Claimant is physically capable of performing the duties of tower clerk. Employer points out that at least two terminals have modified standing workstations which would allow Claimant to perform the tower clerk position within his sitting restriction. EX 14 at 42-45. Employer asserts that, "despite the accommodations made by at least two employers, [Claimant] has made no attempts to obtain the well paying Tower Clerk positions but rather, he continues to take truck delivery work, a position he is simply comfortable with." In support of its position, Employer retained Captain Thomas Lombard as its vocational expert.

Capt. Lombard is a contractor for American President Lines ("APL") and its stevedoring services division, Employer Eagle Marine Services. He teaches labor relations and health and safety on the waterfront to superintendents, managers and directors, and also publishes a manual on the interpretation of various longshore contract documents and how they are affected by the Pacific Marine Safety Code and state and federal OSHA regulations. EX 14 at 6-7. Capt. Lombard's deposition was initially taken on May 24, 2004 and was taken again on September 18, 2006, in connection with this modification proceeding.

In his earlier deposition on May 24, 2004, Capt. Lombard testified that the basic hourly wage for a marine clerk is $30.58, and all clerk's wages are based on this rate.[9] ETX 11, at 156. He explained that a 15 percent job pays 115 percent of the basic wage, plus one to two hours of overtime; a 25 percent job pays 125 percent of the basic wage, plus two to three hours of overtime; and a 30 percent job pays 130 percent of the basic wage, plus three to five hours of overtime. *Id.* at 157. The overtime hours are paid at time-and-a-half. *Id.* at 181. Capt. Lombard testified in his initial deposition that all of the 30 percent jobs – chief supervisor, supercargo clerk, vessel planner, yard planner, and rail planner – do not involve driving a pick up truck, looking overhead, or lifting. ETX 11 at 166. The tower clerk and gate clerk jobs – which are 25 percent jobs – also do not require driving a pick up truck, and the tower clerk job does not involve looking overhead or lifting. *Id.* at 167, 170. Capt. Lombard estimated that a tower clerk would be sitting at a computer about seven hours per day. *Id*. at 199-200.

In his most recent deposition, Capt. Lombard testified that since he last testified in May 2004, the gate clerk jobs have changed to tower clerk jobs. He explained that the tower clerk position involves receiving cargo from, or delivering cargo to, motor carriers. The tower clerk obtains information from the truck driver by asking him questions and by using remote control cameras to obtain data such as license plate and chassis number of the truck. He then integrates the information into a computer. EX 14 at 10-11. Capt. Lombard testified that there would be tower clerk and other marine clerk jobs available to a Local 63 member such as Claimant six or seven days a week, assuming he is physically fit to do the work. *Id.* at 14. He further testified that tower clerk jobs pay eight hours at $34.85 per hour and three hours at $52.28 per hour as a minimum guaranteed amount. *Id.* at 17-18; 52. However, Capt. Lombard said that nothing prohibits a marine clerk from opting to take the basic jobs which pay $30.18 an hour with no guaranteed overtime. *Id*. at 52.

[9] The$30.58 figure appears to be an error. In his recent deposition, Capt. Lombard testified that a basic clerk earns $30.18 per hour, EX 14 at 17, which is consistent with other record evidence of marine clerk wages. *See* EX 9.

With regard to the sitting requirements for the tower clerk job, Capt. Lombard testified that APL maintains one raised workstation so that a tower clerk could stand to operate it. EX 14 at 43-44. He said that the raised workstation was constructed at the request of Claimant. *Id.* at 46. He further testified that he was aware of one other similar workstation on the waterfront, located at the ITS terminal. Id. at 44. He had not seen the other raised workstation, but had had it described to him by the person who installed it. *Id*. at 48. He did not know its height. *Id*. Capt. Lombard said that the only requirement for determining who uses the raised workstation at APL is "whoever needs it gets it. If there is no need for it, anybody gets it." EX 14 at 45. He did not know of any procedure for deciding who gets the station if two people claim to need it. *Id*. Capt. Lombard testified that he did not know of any procedure that would allow a clerk to request dispatch to one of the two raised workstations in the APL or ITS towers. *Id.* at 46. Other than the two standing stations he described, Capt. Lombard testified that all other tower clerk stations are designed for sitting. *Id.* at 54. With regard to the seated tower clerk positions, he said the job keeps the clerk seated for more than three hours per day. *Id*.

As previously noted, Claimant testified that he tried, by submitting a request for accommodations to the Joint Labor Relations Committee, to get standing workstations installed at all area terminals so that he could perform tower clerk work at the higher "key" clerk rate.[10] Tr. at 63. Although Claimant was granted a variance which enabled him to qualify for key clerk status by performing exclusively tower clerk work, he said that he remains unqualified for the promotion because none of the employers have installed modified workstations. Tr. at 68. Capt. Lombard was not aware of Claimant's accommodations request or of any "movement to provide two raised workstations at each stevedore terminal in the [area] Ports." EX 14 at 50-51.

Claimant testified that, on the advice of Dr. Spencer, he sought out marine clerk positions which allow him to primarily stand and to sit when necessary. Tr. at 63. He identified a "truck delivery" position which he has been performing regularly for Stevedoring Services of America. The job entails handling paperwork involved with truck drivers picking up cargo from the warehouse and on the terminal. Tr. at 68. Claimant explained that he is allowed to use his own vehicle for this position, rather than an employer-owned small pick-up truck. He said the job does not require sitting, as all the paperwork can be done standing beside his vehicle using the hood of his SUV as a desk. Tr. at 69. The job involves some bending, "but not terribly much." Tr. at 69. Claimant testified that he picks up the job at his dispatch hall and, provided the employer has enough work, the job lasts for 14 consecutive days, though he does not typically have to work weekends. Tr. at 68. He further testified that because the company is familiar with him, they are willing to accommodate him on days when he has doctor appointments. Tr. at 69. He explained that "since [the employer knows] I'm going to be there for two weeks, they work around my doctor appointments in the assignments they give me, so I don't have to miss a day off work to go to the doctor." Tr. at 69. Claimant has done similar work for Pasha. Tr. at 73. He works an average of five days per week. Tr. at 75.

Claimant testified that he is not qualified for any of the 30 percent jobs. Tr. at 74-75. He further testified that he would take a 30 percent job or 25 percent job—such as tower clerk, yard

[10] As previously noted, Capt. Lombard testified that a basic clerk gets $30.18 with no guaranteed overtime, while a tower clerk gets eight hours at $34.85 per hour and three hours at $52.28 per hour as a minimum guaranteed amount. EX 14 at 17-18, 52.

clerk or floor runner—if he had the opportunity and was capable of performing the job. Tr. at 73-74. He is not aware of any higher paying jobs that he is currently capable of performing, but he is looking "constantly." Tr. at 75. Claimant essentially maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to cope with his back and shoulder conditions, and that he is currently working to his full capacity as a marine clerk by accepting jobs which are within his back and sitting limitations. I agree as it is rather apparent that Claimant is a motivated individual who receives satisfaction in being gainfully employed.

Employer contends that its vocational expert established that Claimant is capable of earning $34.85 an hour plus guaranteed overtime as a tower clerk, but he has not diligently pursued these better paying opportunities. However, I find that Employer has not met its burden of establishing this alternative wage-earning capacity. Employer has not put forth sufficient evidence to establish that the standing tower clerk positions are realistically available to Claimant. Capt. Lombard admitted that the majority of tower clerk jobs are seated positions which would violate Claimant's restriction against sitting for more than three hours a shift. EX 14 at 54. Moreover, self-modification of the more prevalent sitting workstations is not an option, as Capt. Lombard has made clear to Claimant in the past. While at least two of the fourteen terminals in the Los Angeles/Long Beach ports each have one modified standing workstation which would allow Claimant to perform the tower clerk position within his sitting restriction, Capt. Lombard did not know of any procedure that would allow a clerk to request dispatch to one of the two raised workstations. *Id.* at 42-45, 46, 49. Employer introduced no other evidence to establish how Claimant might go about seeking assignment to the standing tower gate positions. It therefore cannot be said that the modified workstations would be available to Claimant on a consistent basis. In light of these facts, I find that Employer has failed to establish that Claimant is capable of earning $34.85 an hour plus overtime as a tower clerk.

Claimant's gross earnings from June 21, 2004 through May 19, 2006 were $149,135.99 for 99 5/7 weeks (698 days), for an average for an average weekly wage of $1,495.63. However, Claimant took time off work for a non-industrial illness from February 1, 2005 through April 3, 2005, a period of 8 6/7 weeks. *See* CX 11 at 123. In addition, Claimant took off a total of four weeks of personal time in 2005 and 2006.[11] As Claimant was not available to work during these 12 6/7 weeks, the number of weeks he was available to work during the period from June 21, 2004 through May 19, 2006 is reduced to 86 6/7 weeks. Dividing his earnings of $149,135.99 by 86 6/7 weeks results in an unadjusted wage earning capacity of $1,717.03 per week. I find that this amount reasonably and fairly represents Claimant's wage-earning capacity pursuant to section 8(h) of the Act, given Claimant's injuries and his abilities. This amount is the appropriate amount in determining Claimant's wage-earning capacity, as it reflects the wages which he actually received. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 406 (1989).

[11] Claimant was off work during the weeks of September 5, 2005, December 2, 2005, December 12, 2005 and in March 2006, for one week on each occasion.

Adjustment for Inflationary Factors

When post-injury wages are used to establish a claimant's wage-earning capacity, sections 8(c)(21) and 8(h) of the Act require that the "claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury." *Quan v. Marine Power & Equipment Co.*, 30 BRBS 124, 127 (1996); *Richardson v. General Dynamics Corp.*, 23 BRBS 237 (1990). The Benefits Review Board has held that if the record is devoid of evidence regarding the wages paid by the alternate employment at the time of injury, the administrative law judge should use the percentage increase in the NAWW to adjust current wages to the rates paid at the time of injury. *Richardson v. General Dynamics Corp*., 23 BRBS 237 (1990). However, when evidence does establish the actual wage a claimant's post-injury job paid at the time of injury, rather than using the NAWW, the adjustment for inflation in determining the effect of the injury on wage-earning capacity is made simply by comparing the average weekly wage with the post-injury job's actual wage at the time of injury. *Kleiner v. Todd Shipyards Corp.,* 16 BRBS 297, 298 (1984). ("We have repeatedly held that the Act requires comparison of actual wages at the time of injury with the wages the post-injury job paid at the time of injury"); *Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 238 (1985) (remanding to calculate post-injury wage-earning capacity by comparing the wage to what the post-injury job paid at the time of injury). Thus, it is clear that only when there is no evidence to determine what the post-injury job paid at the time of injury is the NAWW applied to adjust the claimant's post-injury wages downward.

Here, Employer has accounted for inflation utilizing the basic straight time hourly rate for longshore workers as reflected in the union contract. [12] Specifically, Employer introduced a "page culled from the PMA Annual Report that shows the percentage increases from the collective bargaining agreement on an annual basis." Tr. at 24; EX 9. The parties stipulated that this document accurately reflects the annual increases in the basic hourly rates paid to longshore workers under the collective bargaining agreement. Tr. at 24. However, Claimant asserts that Employer failed to provide evidence or testimony as to how the proffered wage data would apply in this case.

The document introduced by Employer shows the history of increases in the straight time hourly rates paid to longshoremen and marine clerks since 1906. EX 9. It is apparent that the current (2006) hourly rate for basic clerk jobs is $30.18, consistent with the testimony of Capt. Lombard. EX 9; EX 14 at 17. Additionally, the PMA document reflects that the basic wage rate paid for longshoremen and clerks at the time of Claimant's injury in September 2002 was $27.68. EX 9. Accordingly, because there is evidence of the post-injury job's actual wage at the time of injury, it is not appropriate to refer to the increases in the NAWW to adjust the claimant's post-injury wages downward. *See Kleiner v. Todd Shipyards Corp.*, 16 BRBS 297,

[12] At various times, both parties appealed my Decision and Order of April 25, 2005 to the Benefits Review Board. In an Order dated November 15, 2005, the Board acknowledged Claimant's present request for modification, dismissed Employer's appeal without prejudice, and remanded the case to me for consideration of the modification request. The Board wrote: "Once the Administrative Law Judge reopens the case to address claimant's Motion for Modification, employer may seek to introduce the collective bargaining agreement and to argue that the Administrative Law Judge's inflation adjustment should be modified." Accordingly, Employer's argument regarding inflationary adjustment is considered herein.

298 (1984). The method advocated by Employer is preferable to the application of the NAWW as a means of adjusting Claimant's post-injury wages because it provides a reflection of the increase in wages over time which is specific to the longshore industry.

Based on the figures contained in the PMA document, I find that Claimant's adjusted post-injury wage-earning capacity is $1,574.86.[13] That sum, subtracted from the stipulated pre-injury average weekly wage of $2,705.00, yields a wage loss of $1,130.14 per week and a corresponding compensation rate of $753.42 per week.

Date of Modification

Claimant requests that any modification of the amount of compensation be made effective as of the date of injury, which is September 26, 2002 according to the Decision and Order of April 25, 2005. Employer contends that any modification should be effective no earlier than August 26, 2005, the date on which Claimant filed his request for modification. The relevant portion of section 22 states:

> [The administrative law judge may] issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury . . .

See 33 U.S.C. § 922. Thus, the plain language of section 22 specifically allows an increase in compensation to be made effective from the date of injury.

As explained herein, Claimant's newly submitted evidence of his actual earnings in post-injury employment establishes that he has a loss of earnings which is greater than was projected by the original Decision and Order. Accordingly, Claimant is entitled to an increase in compensation as described above, and I am persuaded that applying this increase retroactively to the date of injury is consistent with the plain language of section 22 and will render justice under the Act. *See McCord v. Cephas*, 532 F.2d 1377, 1381, 3 BRBS 371 (D.C. Cir. 1976).

Disputed Medical Expenses

Claimant and Employer apparently agreed to submit as part of this modification proceeding, their disputes over Claimant's requests for reimbursement of certain out-of-pocket payments for medical expenses and for medical mileage.

My Decision and Order of April 25, 2005 contained the following language relevant to the payment of medical benefits to Claimant: (1) "Pursuant to § 7 of the Act, Eagle Marine shall pay any outstanding medical expenses arising out of [Claimant's] cumulative trauma injuries to his back and neck and right scapula, and reimburse [Claimant's] healthcare provider, the ILWU-PMA Welfare Plan, for expenses that it has paid for these injuries; and (2) "Pursuant to § 7 of the Act, [Employer] shall provide [Claimant] with reasonable future medical care related to his

[13] $27.68 is 91.72% of $30.18. $1,717.03 times .9172 equals $1,574.86.

cumulative trauma injuries to his back and neck and his right scapula injury." D&O at 19. Once a decision and order issues and the time for reconsideration has passed, it is properly the province of the District Director and OWCP to enforce that order. *See Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 1304, 25 BRBS 145, 150-51 (5th Cir. 1992). Procedures for enforcing compensation orders are set out in sections 18 and 21 of the Act, 33 U.S.C. §§ 918 and 921. Thus, Claimant's request for an order establishing his right to reimbursement for certain medical expenses is denied, and the appropriate remedy should be pursued in another forum.

ORDER

1. Employer shall pay Claimant compensation for temporary partial disability from December 3, 2003 to May 30, 2004, at the rate of $734.54 per week as compensation for the cumulative trauma injuries to his back and neck, less credit for such sums of temporary partial disability compensation as have been previously paid;

2. Employer shall pay Claimant compensation for permanent partial disability from May 31, 2004 and continuing into the future, at the rate of $734.54 per week as compensation for the cumulative trauma injuries to his back and neck, less credit for such sums of permanent partial disability compensation as have been previously paid;

3. Employer shall pay interest on each unpaid installment of compensation at the rates prescribed under the provisions of 28 U.S.C. §1961.

4. The District Director shall make all calculations necessary to carry out this Order;

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ALEXANDER KARST
Administrative Law Judge

AK:kb